

# **Trial Transcript**

J7P6HERH

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FERNANDO HERNANDEZ, et al.,

Plaintiffs,

v.

12 CV 4339 (ALC)

THE FRESH DIET, et al.,

Defendants.

-----x

New York, N.Y.  
July 25, 2019  
10:00 a.m.

Before:

HON. ANDREW L. CARTER, Jr.

District Judge

APPEARANCES

EDGAR M. RIVERA, ESQ.

Attorney for Plaintiffs

BRONSTEIN, GEWIRTZ & GROSSMAN

Attorneys for Defendants

BY: EDWARD N. GEWIRTZ

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(Case called)

THE COURT: Good morning. We're here for a bench trial on the sole issue of liquidated damages. I have seen the direct by way of affidavit for the defendants. I wanted to confirm the plaintiffs are not affirmatively calling any witnesses or putting forth any affidavits; is that correct?

MR. RIVERA: Yes, your Honor. We won't be calling any witnesses. However, I do intend to cross-examine defendant witnesses. As a matter of housekeeping, I would like to know if I can go a little bit outside of the direct during the cross or whether I should just recall them to the stand in the case-in-chief?

THE COURT: You can go a little bit outside of the direct on cross.

The defendants have submitted affidavits for their direct testimony so let's have plaintiff's counsel call one of the defendants for cross-examination.

MR. RIVERA: We will call Zaimi Duchman.

MR. GEWIRTZ: Your Honor, if I can note my objection for the record for him going outside the direct testimony on the cross-examination.

THE COURT: To be clear obviously, defense counsel, you may object to any question that you feel is inappropriate or irrelevant. While the affidavits are brief, they certainly encompass a lot in terms of liquidated damages and knowledge.

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Duchman - cross

1 I am not sure how much of this will be outside of the scope,  
2 but we'll see.

3 THE DEPUTY CLERK: Remain standing.

4 SCHER DUCHMAN,

5 called as a witness by the Plaintiffs,

6 having been duly affirmed, testified as follows:

7 CROSS-EXAMINATION

8 BY MR. RIVERA:

9 Q. Let's focus on the time period when you first started Fresh  
10 Diet. I believe in your affidavit that is when you were  
11 discussing with your attorney David Willig and the accountants  
12 Arie Harel and Issac Salver.

13 It is your testimony that Mr. Willig was the attorney  
14 that attempted to find out whether the drivers were exempt; is  
15 that correct?

16 A. Willig was probably later on. There was probably some  
17 discussions. I would say we're talking about just in 2006 when  
18 we first started, which was only in Florida. It would have  
19 been the accountant that I had a brief discussion with about  
20 how to classify drivers.

21 Q. And what was that accountant's name?

22 A. Issac Salver.

23 Q. When was the first time that you discussed anything  
24 regarding the driver's classification with Mr. Willig?

25 A. I couldn't tell you exactly. It was so long ago. I would

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Duchman - cross

1 assume some time -- some time between the years 2009 or '08 and  
2 2010 maybe.

3 Q. In 2006 the only person who you relied on to determine  
4 whether the drivers were exempt would be Issac Salver?

5 A. I wouldn't say relied on him. Again, this was only about  
6 Florida, and it was my understanding that there was no question  
7 that these drivers were independence contractors. I had a  
8 brief discussion with him where he verified my understanding of  
9 independent contractors.

10 Q. What did you do to determine that the drivers were  
11 independent contractors?

12 A. Just some brief research on the Internet and just my  
13 understanding that they drive their own cars so they are  
14 independent contractors. They do other jobs so they are  
15 independent contractors. They can do other routes so they are  
16 independent contractors. You know, I think something that I  
17 always thought was Fed Ex is independent contractors and they  
18 are driving a Fed Ex truck, then my drivers who are not driving  
19 their own cars are definitely independent contractors.

20 Q. Do you know what websites you visited on the website?

21 A. I do not.

22 Q. Do you recall what, if any, legal authorities you relied  
23 onto come to the factors that you just explained?

24 A. I do not.

25 Q. Focusing just on 2006, besides you and Issac Salver, is

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Duchman - cross

1 there anybody else who contributed to the decision as to  
2 whether the drivers were classified correctly?

3 A. Not that I can recall.

4 Q. In 2006 were you the sole owner of the Fresh Diet?

5 A. On paper, yes.

6 Q. Did Late Night Express, Inc. exist in 2006?

7 A. I don't remember the exact date when it was formed, but it  
8 was definitely some time in the beginning. So I would assume  
9 so.

10 Q. Moving now to 2009, 2010. What did you discuss with  
11 Mr. Willig about Fresh Diet's classification of their drivers?

12 A. I can't remember specific -- any specifics. I just  
13 remember that we had brief discussions at times with Mr. Willig  
14 who was outside -- yeah, he didn't work for us. He was outside  
15 counsel. Just in general probably that, you know, these  
16 drivers were independence contractors and there is no issue. I  
17 don't remember any specifics.

18 Q. Do you recall why you contacted Mr. Willig?

19 A. I didn't contact him. I mean, he was outside counsel for a  
20 few things and it was -- I just remember having discussions  
21 about this specific independent contractor discussion.

22 Q. Do you recall what he was advising the Fresh Diet on around  
23 that time?

24 A. I know there was an accident at some point so it could have  
25 been about that. Some legal matter.

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Duchman - cross

1 Q. Anything else?

2 A. Not that I can recall.

3 Q. Is it your testimony today that Issac Salver, David Willig,  
4 and yourself discussed whether the drivers were independent  
5 contractors at some point between 2006 and 2010?

6 MR. GEWIRTZ: I object to the to form. His testimony  
7 is --

8 THE COURT: Hold on. Please restate the question.

9 MR. RIVERA: Okay.

10 Q. So the time period is between 2006 and 2010. Is it your  
11 testimony then that you discussed the classifications of  
12 drivers with Issac Salver and David Willig?

13 A. Yes. At some point I discussed it with them in general.

14 Q. Did you always know that you had discussed the issue with  
15 them?

16 MR. GEWIRTZ: Object to the form.

17 THE COURT: Overruled.

18 MR. GEWIRTZ: I am not sure what it means.

19 THE COURT: Overruled.

20 A. I would think I always knew that, yes.

21 Q. Do you remember being deposed in this action?

22 A. Yeah, I was deposed in 2013.

23 Q. Do you remember being asked at that deposition -- and the  
24 line number is -- I will put this on the screen. The page  
25 number 155.

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Duchman - cross

1 Do you recall being asked -- line 19:

2 "Q. Do you recall whether anyone explained to you at any point  
3 why the delivery drivers should be considered independent  
4 contractors?

5 "A. I do not."

6 Do you recall being asked that question and giving  
7 that answer?

8 A. I don't recall, but obviously that is what happened.

9 Q. So contrary to your testimony at your deposition, you do  
10 know that you discussed the issue of the drivers'  
11 classification with Isaacs Salver and David Willig; correct?

12 MR. GEWIRTZ: Objection.

13 THE COURT: Sustained as to form.

14 A. I had --

15 THE COURT: That's sustained as to form.

16 MR. RIVERA: Okay.

17 Q. Now, sitting here today, do you recall that you discussed  
18 why the drivers should be considered independent contractors  
19 with Issac, Salver and David Willig?

20 A. I don't recall if they told me why they should be  
21 classified as independent contractors. I definitely  
22 discussed -- recall discussing in general that they are  
23 independent contractors.

24 Q. So there is a difference between talking about why they  
25 were independent contractors and discussing with them that they



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Duchman - cross

1 were independent contractors; correct?

2 A. I cannot speak to what I was thinking or answering six  
3 years ago, but it just could be that I didn't think about it at  
4 that point.

5 Q. There was a point where you were discussing with attorneys,  
6 accountants, and insurance companies the Fresh Diet's business  
7 practices; correct?

8 A. I don't recall having any discussions with any insurance  
9 companies.

10 Q. Do you recall discussing with either insurance companies,  
11 accountants, or attorneys health insurance of drivers?

12 A. No.

13 Q. What about the tax implications of classifying the drivers  
14 as independent contractors?

15 A. I didn't have those discussions that I can recall.

16 Q. Do you recall discussing with them unemployment insurance  
17 benefits?

18 A. I don't -- no, I don't recall that.

19 Q. Do you recall discussing disability benefits?

20 A. I know that there was some issue with a Bryan White and I  
21 was asked to get on a phone call at a point, but that was the  
22 extent of my involvement that I can recall.

23 Q. Did you discuss with them paid sick leave for drivers?

24 A. I don't recall discussing that.

25 Q. Do you recall the context in which the subject of

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Duchman - cross

1 classification came up?

2 A. I don't.

3 Q. Could it have been in the context of tax treatment?

4 A. I don't think so.

5 Q. Could it have nothing to do with overtime?

6 A. No, I don't think so.

7 Q. You've been a business owner in the past; correct?

8 THE COURT: Let me have the last question and answer  
9 read back.

10 (Record read)

11 THE COURT: I want to make sure --

12 MR. GEWIRTZ: I object to --

13 THE COURT: Hold on. Hold on.

14 Why don't you rephrase those questions. I am just not  
15 sure in terms of the record what that means.

16 MR. RIVERA: Sure.

17 THE COURT: Why don't you rephrase that question.

18 Q. You don't recall whether the issue of driver classification  
19 was brought up in the context of taxes; right?

20 A. I don't believe it was brought up in context of anything.

21 I think it was they are independent contractors.

22 Q. So the issue of driver classification was not brought up in  
23 the context of overtime rules; correct?

24 A. There was no issue to be brought up. They were independent  
25 contractors.

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Duchman - cross

1 Q. You weren't seeking advice in other words into whether you  
2 were paying them overtime correctly?

3 A. I wasn't taking any advice.

4 Q. I believe my last question was that you have been a  
5 business owner in the past; correct?

6 A. In the past from today, or from when are we talking about?

7 Q. From the present, yes.

8 A. Of course, I was a business owner of Fresh Diet.

9 Q. Do you agree that companies save money by hiring  
10 independent contractors rather than employees?

11 MR. GEWIRTZ: Objection.

12 THE COURT: I will allow it.

13 A. I have no idea.

14 Q. Do you understand that independent contractors aren't  
15 entitled to overtime?

16 A. I understand that today.

17 Q. Do you understand independent contractors are not entitled  
18 to health insurance?

19 A. I understand that today.

20 Q. In 2006 did you not understand that?

21 A. In 2006 our company didn't have health insurance for W-2  
22 employees.

23 Q. Did you understand that independent contractors wouldn't be  
24 receiving health insurance in 2006?

25 A. No. It didn't even enter my mind. It wasn't anything that

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Duchman - cross

1 I thought about in 2006 or any time probably until it was in  
2 the news with Obama Care.

3 Q. Do you understand that a business doesn't pay payroll taxes  
4 for independent contractors' compensation?

5 MR. GEWIRTZ: Objection.

6 THE COURT: Overruled.

7 A. Today I understand that.

8 Q. In 2006 did you understand that?

9 A. Nope.

10 Q. Let's focus now on 2009, 2010 and communications with David  
11 Willig.

12 Did you ask Mr. Willig what he needed from you in  
13 order to evaluate the drivers' classification under  
14 wage-an-hour law?

15 A. I did not ask him anything. So to clarify, this was very  
16 brief discussions that it came up where a company's lawyer or  
17 accountant or CFO or CPA all agreed that the drivers were  
18 independent contractors. There wasn't any lengthy  
19 conversations. I didn't seek their advice. It was in a  
20 meeting and it was probably just a very, very brief discussion  
21 where it was there is nothing even to discuss here -- they are  
22 independent contractors.

23 Q. Did they ask you for any information in order for them to  
24 determine whether they were independent contractors or not?

25 A. No. They --

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Duchman - cross

1 MR. GEWIRTZ: Objection.

2 THE COURT: Overruled.

3 A. They knew the information. They didn't need to ask me  
4 anything. They knew the business we were in and how the  
5 drivers operated.

6 Q. Is it your understanding that they based their  
7 determination on the general industry standard?

8 MR. GEWIRTZ: Objection.

9 THE COURT: Overruled.

10 A. Yes. My understanding is that they based their decision on  
11 the litmus test and the fact that the drivers drove their own  
12 car, made their own schedules, brought their spouses with them,  
13 brought their children with them, did paper deliveries at the  
14 same time, potentially delivered other food at the same time,  
15 etc., etc.

16 Q. Did you share with them that -- and this is at any point in  
17 Fresh Diet's existence, whether it was back in 2006, 2009 up  
18 until the bankruptcy. Did you ever share with Mr. Willig or an  
19 accountant that the Fresh Diet had policies that affected the  
20 drivers, one of those policies being returning --

21 MR. GEWIRTZ: Objection.

22 THE COURT: Stop.

23 What was the last part?

24 MR. RIVERA: Returning manifests.

25 THE COURT: I will allow it.

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Duchman - cross

1 MR. GEWIRTZ: He mentioned --

2 THE COURT: I will allow it.

3 MR. GEWIRTZ: I don't know anything about a  
4 bankruptcy. I am not sure it is factual--

5 THE COURT: Overruled.

6 A. I knew nothing about returning manifests.

7 Q. Did you discuss -- again, I am talking about attorney or  
8 accountant -- policies regarding the driver's returning of  
9 coolers?

10 A. I knew nothing about returning of coolers.

11 Q. Did you share with them any policies concerning returning  
12 bags?

13 A. I knew nothing about returning bags. The bags actually  
14 were not returned from my understanding. The bags were kept  
15 and brought back by the drivers whenever they came into work.

16 Q. Did you share with -- again, attorney or accountant -- that  
17 Fresh Diet had policies for the drivers to sign in when they  
18 began and ended their shifts?

19 A. I knew nothing about drivers signing in.

20 Q. Did you share with attorneys or accountants policies  
21 concerning how drivers performed deliveries?

22 A. I knew nothing about that.

23 Q. Did you share with them that drivers were in communication  
24 as they did their routes with the New York manager Syed  
25 Hussain.

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Duchman - cross

1 A. I don't recall sharing that information ever.

2 Q. Did you share with the accountants or attorneys that Fresh  
3 Diet had owned vehicles and that they would allow drivers to  
4 use them to make the deliveries?

5 A. They would know that themselves.

6 Q. But you didn't share that with them?

7 A. I -- I don't know. My understanding is that drivers that  
8 drove our vehicles were W-2. If there was a point that they  
9 weren't, that could have been something that I didn't know.

10 Q. Okay. Did you ever share with them that drivers were  
11 helping to bag food in the kitchen before they started their  
12 route?

13 A. I never knew that that would ever happened. So there would  
14 be no way I would have shared that information.

15 Q. And you don't know what, if any, research any lawyer or  
16 accountant did to help determine whether the drivers were  
17 classified correctly; correct?

18 A. I don't know.

19 Q. You can't say sitting here today any specific statutes that  
20 they relied on?

21 A. I cannot say that.

22 Q. Any cases that they relied on?

23 A. I cannot say that.

24 Q. Orders that they relied on?

25 A. Again, you are saying they relied on it. I mean, it was

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Duchman - cross

1 again a fact that they were independent contractors if the  
2 point of adding them to my affidavit was that they verified  
3 that they were correctly labeled as independent contractors.  
4 It was not something I sought out, Hey, can we make them  
5 independent contractors. It was, Hey, they are independent  
6 contractors. Is that good? Of course it is good. Pretty much  
7 end of discussion.

8 Q. In your affidavit that you submitted in anticipation of  
9 this bench trial, you testified that plaintiffs filled out form  
10 1099s; is that correct?

11 A. Yes, that was my understanding.

12 Q. Is it your understanding that they filled out form W-9s and  
13 that the company would then issue form 1099s?

14 A. I don't know the semantics of it. It is my understanding  
15 that they signed independent contractors agreements and they  
16 were given whatever forms to go along with that. I believe it  
17 to be 1099s, but I could be mistaken.

18 Q. Regardless of whether it was a Form W-9 or Form 1099, it is  
19 correct that Fresh Diet provided the drivers that form;  
20 correct?

21 A. That is my understanding.

22 Q. And that Fresh Diet instructed them to fill out the tax  
23 forms; correct?

24 A. I don't know.

25 Q. What titles did you hold with Fresh Diet?



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Duchman - cross

1 A. What titles did I hold?

2 Q. Correct.

3 A. I was the CEO and then I was chairman of the board.

4 Q. Was it your decision to hire David Willig as outside  
5 counsel?

6 A. Yes, I guess so.

7 Q. Was it your decision to hire accountants Arie Harel and  
8 Issac Salver as Fresh Diet's accountants?

9 A. Yep.

10 Q. As the CEO and chairman of Fresh Diet, you ultimately have  
11 control over who Fresh Diet hires; correct?

12 MR. GEWIRTZ: Objection, calls for a legal conclusion.

13 THE COURT: Overruled.

14 You may answer.

15 A. Just to clarify, I was chairman of the board only from 2013  
16 until 2014. I definitely did not do any hiring then.

17 Q. Let's focus on 2006 to 2013 when you were the CEO.

18 A. Well--

19 THE COURT: Hold on. There is not a question for you.

20 Q. When you were the CEO of the Fresh Diet, you had the  
21 ability, whether you exercised it or not, to make hiring  
22 decisions; correct?

23 A. I would say depending on the department, I guess.

24 Q. There was no one who would stop you from hiring someone you  
25 wanted; correct?

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Duchman - redirect

1 A. I cannot recall hiring anyone after the executives. So I  
2 wouldn't really know.

3 Q. Did you hire Richard Silverman?

4 A. Yes. He is the executive.

5 Q. Did you hire Mordy Loksen?

6 A. No.

7 Q. Who did?

8 A. I would say either the CEO Juda or Richard Silverman, the  
9 CFO. I don't remember the exact hire dates.

10 Q. You brought in Juda Schlass; correct?

11 A. I don't know what "brought in" means.

12 Q. You hired Mr. Schlass; correct?

13 A. Mr. Schlass was a partner. So I am not really sure how to  
14 clarify that. He basically started the business with me.

15 Q. Did you hire Yosef Schwartz?

16 A. Same thing. He was a partner who started a business with  
17 me.

18 MR. RIVERA: No further questions.

19 THE COURT: Any redirect?

20 MR. GEWIRTZ: A little bit, yes.

21 REDIRECT EXAMINATION

22 BY MR. GEWIRTZ:

23 Q. Mr. Duchman, did Fresh Diet Late Night have any W-2  
24 employees at all?

25 A. Of course.

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Duchman - recross

1 Q. And approximately how many W-2 employees did the company  
2 have?

3 A. Hundreds.

4 Q. And with respect to deliveries that were made in New York,  
5 were you involved in the minutia of how deliveries were made in  
6 New York?

7 A. I wasn't involved at all. I lived in Miami the entire  
8 time. My focus was on sales and marketing. I had two partners  
9 that were focused on operations. My partner Josef Schwartz  
10 moved to New York to handle operations. And if I came to New  
11 York, I didn't even -- people used to say you -- when I came  
12 Josef would say, Come to the kitchen and check it out, because  
13 I would literally stay in the office and work on sales and  
14 marketing and growing the business.

15 Q. Prior to this case being brought against yourself and  
16 others, did anybody complain to you -- a New York driver --  
17 that he or she were working overtime hours and not being paid  
18 for them?

19 A. Never. I never had anyone come over to me, not a driver,  
20 not a manager to complain about anything related to the hours  
21 or overtime.

22 MR. GEWIRTZ: No more questions for him.

23 THE COURT: Okay.

24 RECROSS-EXAMINATION

25 BY MR. RIVERA:

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Schlass - cross

1 Q. You testified that no one came to you to complain about  
2 hours or overtime; correct?

3 A. Correct.

4 Q. Are you aware of anyone raising any complaints about hours  
5 or overtime with anybody at Fresh Diet?

6 A. I am not.

7 MR. RIVERA: No further questions.

8 THE COURT: The witness is excused.

9 (Witness excused)

10 THE COURT: Let's have the next witness take the stand  
11 for cross-examination.

12 JUDA SCHLASS,

13 called as a witness by the Plaintiffs,

14 having been duly affirmed, testified as follows:

15 CROSS-EXAMINATION

16 BY MR. RIVERA:

17 Q. Regarding the classification of the drivers, is it your  
18 testimony that Fresh Diet followed the industry standards?

19 MR. GEWIRTZ: Objection.

20 THE COURT: Overruled.

21 A. From my knowledge, yes.

22 Q. And how do you know that?

23 A. I was aware that other companies, our competitors or also  
24 the drivers that they were using for deliveries were classified  
25 that way. I know that because when we begin -- when we started

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Schlass - cross

1 the business in New York and had taken over the existing  
2 company Balance for Life, the drivers -- the delivery drivers  
3 were classified that way. So we just continued.

4 Q. Do you have any other reason besides what you just  
5 testified about to believe that Fresh Diet's classification was  
6 following industry standards?

7 MR. GEWIRTZ: Objection.

8 THE COURT: Overruled.

9 A. What do you mean the industry standard, like, other diet  
10 delivery companies or I am not sure?

11 Q. I will rephrase it.

12 You testified that you believed that Fresh Diet was  
13 following the same classification as your competitors in  
14 similar industries; is that correct?

15 A. Yes.

16 Q. Do you have any other reason to believe that you were  
17 following these standards besides that?

18 A. I knew that we have -- we had lawyers and accountants in  
19 the company that were educated on labor laws and that sort of  
20 thing. So I would imagine that they knew the classification.

21 Q. Did you participate in any of these discussions with these  
22 lawyers?

23 A. Not that I recall.

24 Q. Do you recall the names of these lawyers who have knowledge  
25 of labor laws?

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Schlass - cross

1 A. Well, I knew David Willig and I know that there were some  
2 lawyers from the KDV law firm. I just don't know which ones  
3 or --

4 Q. Let start with David Willig.

5 How do you know that he is knowledgeable about  
6 wage-an-hour laws?

7 A. My take is that as a lawyer, he has the capacity to  
8 research. Maybe if he is not -- if he doesn't specialize in  
9 labor law, he would know where to look and gather information  
10 about it. So I don't know what he specialized in; but I figure  
11 he has knowledge in all these areas.

12 Q. Moving on to KDV, it is true that you retained them in and  
13 around September of 2011; correct?

14 A. Yeah. I believe it was around that time, yes. I don't  
15 remember exactly.

16 Q. So Fresh Diet couldn't have relied on any advice from KDV  
17 prior to September 2011; correct?

18 A. Yeah. I mean, if we hired them in September 2011, then I  
19 don't think we had any advice before that.

20 Q. What titles did you hold with Fresh Diet?

21 A. I know I was chef and at some point I think my only  
22 official title was maybe chief operating officer or director of  
23 operations.

24 Q. As COO who did you report to?

25 A. I would report -- the dynamics and the structure wasn't

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Schlass - cross

1 that I needed to report to anyone above me, but I would report  
2 to, I guess, Zaimi or Yos or I could be reporting to Richard  
3 Silverman or any of the other executives.

4 Q. Are you saying that you and the other executives were more  
5 or less on the same level?

6 A. Yeah, probably.

7 Q. So you and Richard, you don't report to him and he doesn't  
8 report to you?

9 A. Right.

10 Q. Does or did Mordy Loksen report to you?

11 A. No.

12 Q. Who did Mordy Loksen report to?

13 A. I am not sure.

14 Q. Did Sandy Orneals report to you?

15 A. Yeah, she did report to me at times.

16 Q. Yosef Schwartz, were the two of you on the same level or  
17 did he report to you?

18 A. We would be on the same level.

19 Q. Do you know Amber Williams?

20 A. No.

21 Q. Does that name mean anything to you?

22 A. Amber Williams?

23 Q. Amber Williams.

24 A. I have no recollection of that name.

25 Q. Do you recall her applying for unemployment insurance

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Schlass - cross

1 benefits some time around summer of 2011?

2 MR. GEWIRTZ: Objection.

3 THE COURT: I will allow it.

4 A. I have -- still have no idea who she is.

5 Q. Do you recall receiving a notice from the New York  
6 Department of Labor concerning her application for unemployment  
7 insurance benefits?

8 A. Still don't know who she is. So I have no -- no knowledge  
9 of anything regarding her.

10 Q. I am going to show you a document that was produced by your  
11 attorneys during the litigation.

12 A. Okay.

13 MR. GEWIRTZ: Your Honor, I would object. I don't  
14 believe any documents were shown that were --

15 THE COURT: Overruled.

16 MR. GEWIRTZ: Okay.

17 Q. Let me know when the document appears on your screen.

18 A. Yes, it's here.

19 MR. GEWIRTZ: I believe the social security number  
20 should be redacted.

21 THE COURT: Hold on. Hold on.

22 What is your objection, counsel?

23 MR. GEWIRTZ: I am saying I don't believe -- I believe  
24 they should redact the social security number on the document.

25 THE COURT: There is no jury here. That's fine. This



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Schlass - cross

1 is not being admitted into evidence at this point.

2 Q. At the top of this document, you can see the seal of New  
3 York; correct?

4 A. Yes.

5 Q. You can see on the seal it says Department of Labor;  
6 correct?

7 A. Yeah.

8 Q. You can see that it is addressed to Late Night Express;  
9 correct?

10 A. Yes.

11 Q. I would like you to take a second and read -- well, strike  
12 that.

13 Do you recall ever seeing this document before today?

14 A. No.

15 Q. Do you have any idea how this document ended up with your  
16 attorneys?

17 A. I have no idea.

18 Q. Please take a second to review pages 1, 2, and 3. When you  
19 are ready, I will scroll down for you and I will ask you a  
20 couple questions about these three pages.

21 THE COURT: Hold on a second. Let's have a quick side  
22 bar off the record.

23 (Side bar; off-the-record discussion)

24 BY MR. RIVERA:

25 Q. So you never saw that document from the Department of Labor

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Schlass - cross

1 that was just shown to you; correct?

2 A. I don't recall ever seeing that.

3 Q. Do you know who Andrew Spence is?

4 A. No.

5 Q. Do you recall his applying for unemployment insurance  
6 benefits around September 2011?

7 MR. GEWIRTZ: Objection.

8 THE COURT: Overruled.

9 A. I don't know who he is.

10 Q. Do you recall The Fresh Diet retaining the law firm of  
11 Kaufman Dolowich & Voluck to represent them at the Department  
12 of Labor?

13 A. I don't recall the exact circumstances and reasons for the  
14 retainment of KDV. I know generally it was related to -- to  
15 labor issues.

16 Q. I am going to show you a letter that was addressed to you  
17 from KDV. Let me know when you see it.

18 On this letter on the top right is KDV's letterhead;  
19 right?

20 A. Yes.

21 Q. And a little below that is the date that this letter was  
22 sent, September 14th, 2011; correct?

23 A. Yeah.

24 Q. On the left of that it is addressed to you, correct, Juda  
25 Schlass?

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Schlass - cross

1 A. Correct.

2 Q. In reviewing the content of this letter, this was for the  
3 retention of legal services; correct?

4 A. Correct.

5 MR. RIVERA: At this point I would like to move this  
6 into evidence as Plaintiff's Exhibit 1 as a true copy of the  
7 retention letter sent to KDV to Late Night.

8 THE COURT: Any objection?

9 MR. GEWIRTZ: I can't see the whole letter so I would  
10 like to see the whole letter before I can make a determination.

11 I would like a little bit of voir dire on this.

12 THE COURT: You have to speak up.

13 MR. GEWIRTZ: I would like to ask a few questions on  
14 voir dire to see if -- I don't believe he has laid a foundation  
15 for its admissibility yet.

16 THE COURT: Hold on a second.

17 I think they are handing you a paper copy of the  
18 letter so you can see the entire letter.

19 Have you seen the letter now?

20 MR. GEWIRTZ: I have seen it. It's not signed by  
21 Mr. Schlass.

22 THE COURT: I am not asking you that. I am asking  
23 have you seen it. If you want to ask questions, you can. If  
24 you want to voir dire on this, you can.

25 MR. GEWIRTZ: Okay. If I could ask some questions.

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Schlass - cross

1 THE COURT: Go ahead.

2 VOIR DIRE

3 BY MR. GEWIRTZ:

4 Q. Mr. Schlass, do you recall whether you ever seen this  
5 letter before?

6 A. I don't recall.

7 MR. GEWIRTZ: I object to its admissibility. He has  
8 no recollection of seeing this letter before. He has testified  
9 and there is no --

10 THE COURT: Okay.

11 MR. GEWIRTZ: -- no foundation.

12 THE COURT: Plaintiff, what is your position on that?

13 MR. RIVERA: I can provide foundation.

14 THE COURT: Go ahead.

15 Before you do that, can you put the letter back up.

16 MR. RIVERA: Sure. I was going to pull up another  
17 document.

18 THE COURT: Scroll up a little bit.

19 MR. RIVERA: Sure.

20 THE COURT: Not that far up.

21 Insofar as the contents of the letter -- hold on right  
22 there. Go up to the next page.

23 MR. RIVERA: I am sorry, your Honor.

24 THE COURT: Go down to the next page.

25 Let's have a quick side bar. We don't need the court

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Schlass - cross

1 reporter.

2 (Side bar; off-the-record discussion)

3 BY MR. RIVERA:

4 Q. I am going to try this again.

5 THE COURT: Okay.

6 BY MR. RIVERA:

7 Q. You submitted an affidavit -- strike that.

8 You brought suit against KDV alleging malpractice;  
9 correct?

10 A. Yeah.

11 Q. As part of that lawsuit, you submitted an affidavit;  
12 correct?

13 A. Yeah.

14 Q. You submitted that affidavit on November 28th, 2017;  
15 correct?

16 A. If it says so.

17 Q. I am going to show you the affidavit now.

18 Before I do, your testimony was that you didn't recall  
19 receiving that retention letter that I showed you earlier  
20 correct?

21 A. Correct.

22 Q. Is this your affidavit that you submitted? I am directing  
23 your attention to paragraph five. That paragraph states on or  
24 about September 14th, 2011, in my capacity as COO of The Fresh  
25 Diet, I received from defendant Kaufman Dolowich & Voluck, LLP,

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Schlass - cross

1 a retention of services letter, a true and correct copy of  
2 which is attached hereto as Exhibit 1.

3 That is what you put in your affidavit; correct?

4 A. Yes.

5 Q. Directing your attention to the last page you signed this  
6 affidavit; correct?

7 A. Yes.

8 Q. Is your memory as to whether you received that retention  
9 letter refreshed?

10 A. Yeah. I mean, I am not disputing that I received it. I  
11 just don't remember when I got it or the circumstances.

12 Q. Do you recall why Fresh Diet retained KDV?

13 A. I know it was a labor-related matter. I don't know if it  
14 was -- I don't recall if it was related to a driver or an  
15 employee or --

16 Q. It was related to unemployment insurance benefits; correct?

17 A. I don't know.

18 Q. It was because an individual alleged they were entitled to  
19 receive unemployment insurance benefits; correct?

20 A. I don't know.

21 Q. Let's take a look at your affidavit again.

22 A. Paragraph six of your affidavit reads: The current legal  
23 issues referenced in the retention of service letter was an  
24 administrative matter before the New York State Department of  
25 Labor, Unemployment Insurance Division, which had been brought

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Schlass - cross

1 by an individual who alleged he -- there is a typo here --  
2 alleged he entitled to receive unemployment insurance benefits.  
3 True and correct copy of a letter dated September 11th, 2011,  
4 from the New York State Department of Labor detailing the  
5 claims and that administrative proceeding is attached hereto as  
6 Exhibit 2.

7 Does that refresh your recollection as to what was  
8 happening between Fresh Diet and the Department of Labor at  
9 that time?

10 A. No.

11 Q. Reading your own affidavit, you still don't know what  
12 services KDV was providing for Fresh Diet?

13 A. No, no. I know what they were doing, but I don't recall --  
14 you asked me if I remember the specifics around the time of  
15 this September 11th, 2011? Is that what you are asking me if I  
16 remember, like --

17 Q. Strike that question or withdrawn.

18 Are you saying that you don't know who that individual  
19 is referenced in paragraph six?

20 A. No, I don't.

21 Q. I will show you one more document.

22 Taking a look at the first page of this decision from  
23 the Department of Labor, do you recall seeing this before?

24 A. I don't.

25 Q. You never seen this before in your life?

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Schlass - cross

1 A. I don't recall seeing this.

2 Q. Do you see the top where it says that this was filed as  
3 part of a lawsuit in New York County?

4 A. Where is that?

5 Q. Filed in New York County Clerk, 11-28-2017.

6 Do you see that?

7 A. Oh, yeah. At the top of the page, yeah.

8 Q. This was filed as part of your affidavit in that action;  
9 correct?

10 A. If it says so.

11 Q. So you have seen this document before today; correct?

12 A. Yeah.

13 Q. And after receiving this document, you retained KDV to  
14 retain Fresh Diet; right?

15 A. Sorry. Can you say that again?

16 Q. After you received this document, which is dated  
17 September 8, 2011, you retained KDV to represent The Fresh  
18 Diet; correct?

19 A. Yeah. I mean, again, I don't remember the timeline and  
20 circumstances receiving this and then retaining them. I know  
21 there were other individuals like Mordy Loksen and I don't know  
22 other executives in the company who had originally initiated  
23 the discussion with KDV. They were aware of any of the legal  
24 or labor issues. And I entered into the picture in the  
25 retention stage of having to sign in my capacity retaining



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Schlass - cross

1     them, but I definitely was not aware -- I don't recall being  
2     aware at the time of the specific issue why we were hiring them  
3     or who the person was.

4     Q.   You reviewed this decision from the Department of Labor;  
5     correct?

6     A.   When?

7     Q.   Around the time that it was received, September 2011?

8     A.   Possibly. I don't know. It has been many years. I don't  
9     recall specifically reviewing this. I may have reviewed it.  
10    Maybe not. I don't recall right now what happened then.

11    Q.   I am directing your attention to the third paragraph from  
12    the bottom of the letter that states: This information  
13    indicates you exercised or reserve the right to exercise  
14    sufficient supervision, direction and control over the claimant  
15    services to establish an employee-employer relationship.  
16    Therefore, it is our determination that the claimant was your  
17    employee.

18                You hired KDV to try to reverse that determination;  
19    correct?

20                MR. GEWIRTZ: Objection.

21                THE COURT: Overruled.

22    A.   I was just reading that.

23                Can you ask me that question again?

24    Q.   Sure. You hired KDV in order to try to reverse that  
25    determination; correct?

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Schlass - cross

1 A. Yeah, very likely.

2 Q. In 2011 after having received this decision, you didn't  
3 interview any drivers about facts to figure out if they were  
4 properly classified, did you?

5 A. Me, no.

6 Q. As far as you know nobody at Fresh Diet did that; correct?

7 A. I don't know.

8 Q. You didn't do any studies or surveys to determine what the  
9 drivers were actually doing; correct?

10 A. Personally, I didn't do any.

11 Q. You don't have any knowledge of anyone at Fresh Diet --

12 A. I don't know if anyone did anything.

13 Q. Obviously the practice of classifying drivers as exempt or  
14 independent contractors didn't change?

15 A. In 2011?

16 Q. Or at any point after September 2011.

17 A. I think it did change at some point. I just don't know  
18 when and for whom.

19 Q. Was there a point in Fresh Diet's history that its drivers  
20 were classified as employees?

21 A. I think so.

22 Q. What makes you believe that?

23 A. Well, I knew that -- I don't recall the times, but I know  
24 that, you know, probably after this lawsuit was filed around  
25 that time I know there were some drivers who were W-2 employees

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Schlass - cross

1 depending on the specific work they were doing. Again, I don't  
2 remember specifics. I believe that there was some change. I  
3 just don't know when or how. And if there wasn't even change,  
4 I could be wrong. It is just I was out of the -- the company  
5 in 2013. It continued on for a couple years. After that I may  
6 have heard something about change, but I cannot really point to  
7 a specific thing but --

8 Q. In March 2012 -- now we are getting away from this exhibit.  
9 In March 2012 you learned for the first time that certain  
10 drivers used by the Fresh Diet were contemplating initiating  
11 litigation against the Fresh Diet; correct?

12 A. I don't remember that.

13 Q. Okay. Again, I am going to show you your affidavit.

14 A. Again, I am not saying it didn't happen. You are asking  
15 what happened in March of that year. I don't remember today.  
16 Obviously I learned that the drivers were intending on filing a  
17 lawsuit. I don't remember when that happened. It could have  
18 been March. I am not arguing about it. I just don't remember  
19 today if it was March or an earlier date or a later date.

20 Q. But in the affidavit that you submitted in 2017, you did  
21 know that around March 2012 drivers were contemplating filing a  
22 lawsuit against Fresh Diet?

23 A. Yes, if I just said that then I obviously recall that now.

24 Q. That lawsuit was about unpaid overtime; correct?

25 A. Correct.

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Schlass - redirect

1 Q. At that time in March 2012, neither you nor anyone in Fresh  
2 Diet changed the practice at classifying drivers; correct?

3 A. I definitely didn't.

4 Q. And neither you nor anybody at Fresh Diet took any steps to  
5 find facts to determine whether the drivers were properly  
6 classified; correct?

7 A. I definitely didn't.

8 Q. Earlier you said that there were other drivers who had  
9 applied for unemployment insurance benefits; correct?

10 A. Earlier.

11 Q. It's true that drivers for Fresh Diet had applied for  
12 insurance benefits; correct?

13 A. Yes, I said that.

14 Q. Do you recall Juany Guzman, a Fresh Diet driver, applying  
15 for unemployment insurance benefits?

16 A. No.

17 Q. You don't recall the Department of Labor issuing a decision  
18 finding that he was an employee?

19 A. I don't recall that.

20 MR. RIVERA: I have no further questions.

21 THE COURT: Any redirect?

22 MR. GEWIRTZ: Yes, your Honor, a little bit.

23 REDIRECT EXAMINATION

24 BY MR. GEWIRTZ:

25 Q. Mr. Schlass, once KDV was hired to represent you --

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Schlass - redirect

1 represent the Fresh Diet, did you rely on them for legal advice  
2 concerning the workers at issue in this lawsuit?

3 A. Yeah. I believe they were hired for that purpose, and I  
4 believe that it was the HR department or the accounting or they  
5 were communicating with KDV on any of the issues they were  
6 retained for.

7 Q. Okay. And did KDV tell you that these workers were  
8 employees and that you had to change the way you were paying  
9 them?

10 A. No, they did not.

11 Q. Did KDV take a position and defend that these were properly  
12 classified workers and what you were doing was defensible in  
13 the lawsuit?

14 A. Yes.

15 Q. And to your knowledge was a motion for summary disposition  
16 of the case made in what you sought before a trial that these  
17 were employees of the Fresh Diet?

18 A. I don't remember that. It sounds about right.

19 Q. Do you know whether or not there was a motion for summary  
20 judgment made in the case?

21 A. Yes.

22 Q. Do you know the outcome of that motion?

23 A. It was denied.

24 Q. So in your own understanding is it correct to say that even  
25 the court had an issue as to whether or not these were properly

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Schlass - recross

1 classified workers prior to a trial being had?

2 MR. RIVERA: Objection.

3 THE COURT: Sustained.

4 Go ahead.

5 MR. GEWIRTZ: I have no more questions.

6 THE COURT: Anything else?

7 RECROSS-EXAMINATION

8 BY MR. RIVERA:

9 Q. You don't have any idea what KDV did to reach the  
10 conclusion that the drivers were properly classified; correct?

11 A. Correct.

12 MR. RIVERA: No further questions.

13 THE COURT: The witness is excused.

14 (Witness excused)

15 THE COURT: I believe that is all of the testimony, is  
16 that correct, counsel for plaintiff?

17 MR. RIVERA: That's correct.

18 THE COURT: Counsel for defense?

19 MR. GEWIRTZ: Yes, your Honor.

20 THE COURT: Let's do this: I will try to get this  
21 turned around relatively quickly. Let's have each side submit  
22 findings of fact and conclusions of law. Let's have plaintiff  
23 submit proposed findings of fact and conclusions of law. Let's  
24 have both sides submit them two weeks from today and then each  
25 side can respond to the other side's proposed findings of fact

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Schlass - recross

1 and conclusions of law two weeks after that. Let's have each  
2 side submit their initial proposed findings of fact and  
3 conclusions of law on August the 14th.

4 MR. GEWIRTZ: Your Honor --

5 THE COURT: August 8th.

6 MR. GEWIRTZ: Now that you changed it, the 14th I have  
7 a friend getting married. You changed it to the 8th so...

8 THE COURT: Yes, August 8th.

9 The response to the other side's proposed findings of  
10 fact and conclusions of law should be submitted by August 22nd.  
11 Anything else from plaintiffs today?

12 MR. RIVERA: No, nothing from plaintiffs.

13 THE COURT: Anything else from defendants today?

14 MR. GEWIRTZ: I suppose I will argue in my findings of  
15 fact and conclusions of law?

16 THE COURT: Yes.

17 What did you say?

18 MR. GEWIRTZ: Whatever it is, I will put it in my  
19 findings of fact and conclusions of law.

20 THE COURT: Thank you.

21 We're adjourned.

22 o0o

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